



June 6, 2017

By FOIA Online

National Freedom of Information Officer
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (Mail Code 2822T)
Washington, DC 20460
(202) 566-1677

**Re: Freedom of Information Act Request for Correspondence between EPA and the
New York State Department of Environmental Conservation Regarding
Permitting of Confined Dairy Animal Operations**

Dear Regional Freedom of Information Officer:

On behalf of Riverkeeper, Inc., Earthjustice submits this request for records in accordance with the provisions of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, and the implementing regulations of the U.S. Environmental Protection Agency ("EPA"), 40 C.F.R Part 2. The focus of this request is records relating to the New York State Department of Environmental Conservation's Clean Water Act General Permit for CAFOs, Permit No. GP-0-16-002, which was released in draft form in December of 2015 and in final form on January 25, 2017 ("NYSDEC CAFO General Permit").

Riverkeeper, Inc. requests a fee waiver for this FOIA request.

RECORDS REQUESTED

For purposes of this request, the term "records" means information and documents of any kind, including, but not limited to: documents (handwritten, typed, electronic or otherwise produced, reproduced, or stored), letters, e-mails, facsimiles, memoranda, correspondence, notes, databases, drawings, diagrams, maps, graphs, charts, photographs, minutes of meetings, summaries of telephone conversations, notes and summaries of interviews, electronic and magnetic recordings of meetings, and any other compilation of data from which information can be obtained.

Specifically, we seek:

- 1) From the time period starting on January 1, 2012 up to and including the date of EPA's acknowledgment of this request, all records reflecting any communication, written or verbal, between EPA and any New York State Department of Environmental Conservation ("NYSDEC") staff or personnel relating to any draft version of the NYSDEC CAFO General Permit;
- 2) All records reflecting any communication, written or verbal, between EPA and any NYSDEC staff or personnel relating to the final NYSDEC CAFO General Permit;

- 3) All records reflecting any communication, written or verbal, between EPA and any NYSDEC staff or personnel relating to the final NYSDEC CAFO General Permit subsequent to transmittal of the EPA Comments on Final Permit;
- 4) From the time period starting on January 1, 2012 up to and including the date of EPA's acknowledgment of this request, all records identifying, discussing, mentioning, describing, reporting or analyzing, any draft version or the final version of the NYSDEC CAFO General Permits, including but not limited to any communications between EPA Region 2 and EPA Headquarters or EPA and NYSDEC; and
- 5) From the time period starting on January 1, 2012 up to and including the date of EPA's acknowledgment of this request, any and all notices of violation issued by EPA to any CAFO in New York State operating under the CWA General Permit in effect at that time;
- 6) From the time period starting on January 1, 2012 up to and including the date of EPA's acknowledgment of this request, any and all consent agreements or decrees entered into between EPA and any CAFO in New York State operating under the CWA General Permit in effect at that time; and
- 7) For any CAFOs that are the subject of notices of violation and/or consent agreements or decrees that are produced in Requests #5 & #6, above, the Annual Nutrient Management Plan and Comprehensive Nutrient Management Plan that was in effect at the time of the violation that gave rise to the consent agreement or decree.

RECORD DELIVERY

To the extent practicable, Riverkeeper requests electronic copies of the above documents. We are seeking full disclosure of all information in the requested records. In the event that you determine that you can disclose only some of the information contained in a record that falls within the scope of this request, please provide us with a copy of the record with only the information that you have determined to be properly treated as confidential redacted.

If any information requested herein was, but is no longer, in EPA's possession or subject to its control, state whether it is (a) missing or lost, (b) has been destroyed, (c) has been transferred voluntarily or involuntarily to others, or (d) otherwise disposed of, and in each instance, explain the circumstances surrounding and authorization for such disposition of it and state the date or approximate date of it.

Agencies are advised to "make discretionary disclosures of information" and refrain from withholding records "merely because [they] can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption." Memorandum from the Attorney General to Heads of Executive Departments and Agencies (Mar. 19, 2009), *available at* <https://www.justice.gov/sites/default/files/ag/legacy/2009/06/24/foia-memo-march2009.pdf>. If you claim that any of the foregoing information is exempt from mandatory disclosure, we respectfully request that you:

- (1) Provide an index of all documents containing the requested information, reflecting the date, author, addressee, number of pages, and subject matter of such documents;
- (2) State the exemption you deem to be applicable to each information request;
- (3) State with particularity the reason why such exemption is applicable to each information request;
- (4) Examine each information request to determine if reasonably segregable non-exempt information exists which may be released after redacting information deemed to be exempt; and
- (5) Exercise your discretion to release such records notwithstanding the availability of a basis for withholding.

FEE WAIVER REQUEST

Pursuant to 5 U.S.C. § 552(a)(4)(A)(iii), we request a fee waiver because “disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1). EPA examines four factors when considering whether a request contributes to public understanding: 1) the subject of the request; 2) the informative value of the information being disclosed; 3) the contribution to an understanding of the subject by the public is likely to result from disclosure; and 4) the significance of the contribution to public understanding. *See* 40 C.F.R. § 2.107(l)(2). Additionally, to determine whether the request “is not primarily in the commercial interest of the requester” the government will consider two factors: 1) The existence and magnitude of a commercial interest, and 2) the primary interest in disclosure. *See id.* § 2.107(l)(3).

As demonstrated below, each of the factors related to the fee waiver requirements specified in EPA’s FOIA regulations at 40 C.F.R. § 2.107(l)(2)–(3), weigh in favor of granting our fee waiver request. Moreover, federal courts have held that FOIA “is to be liberally construed in favor of waivers for noncommercial requesters.” *Citizens for Responsibility & Ethics in Washington v. U.S. Dep’t of Health & Human Servs.*, 481 F. Supp. 2d 99, 106 (D.D.C. 2006) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987)).

Additionally, in September of 2015, EPA granted a request for a fee waiver associated with a FOIA request filed on behalf of Riverkeeper. *See* Letter from Larry F. Gottesman, National FOIA Officer, EPA, to Eve C. Gartner, Earthjustice (Sep. 30, 2015), attached hereto as Exhibit 1. The underlying basis for a fee waiver for the instant request, discussed in detail below, remains substantially the same as that from the September 2015 FOIA request. Therefore, EPA should grant a fee waiver here.

A. The Request is in the Public Interest.

Factor 1: The Request Seeks Information That Has a “Direct and Clear” Connection to Operations or Activities of the Federal Government.

The first factor for a fee waiver requires that the subject of the request “concern[s] identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(l)(2)(i). The instant request meets this test insofar as the records sought relate to EPA’s oversight responsibilities of a state-delegated Clean Water Act permitting program. Under the Clean Water Act and the Memorandum of Agreement delegating administration of permit programs to NYSDEC, EPA Region 2 maintains certain oversight responsibilities for the New York State Pollutant Discharge Elimination System, under which NYSDEC CAFO General Permit was issued.¹ The requested records pertain to those oversight responsibilities and specifically EPA’s review of the NYSDEC CAFO General Permit. Therefore, the requested records have a direct and clear connection to operations and activities of the federal government.

Factor 2: Disclosure of the Requested Records is “Likely to Contribute” to Public Understanding of Government Operations or Activities.

The next factor EPA considers is whether disclosure of the requested records is “likely to contribute” to an “understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(ii). To satisfy this requirement, the disclosable records must be “meaningfully informative about government operations or activities.” *Id.* Information not “already . . . in the public domain” is considered more likely to contribute to an understanding of government operations or activities. *Id.*

Here, the records being sought will provide Riverkeeper and the general public meaningful information about government operations and activities because such disclosure will increase understanding of EPA’s exercising of its oversight responsibilities under the Clean Water Act and its Memorandum of Agreement with NYSDEC with respect to the NYSDEC CAFO General Permit.

This information is not already accessible through EPA’s website or otherwise in the public domain.

Factor 3: Disclosure of the Requested Records Will Contribute to “Public Understanding” of EPA’s Oversight of NYSDEC-Issued Clean Water Act Permits

EPA next considers whether disclosure will contribute to “public understanding” of the subject. *Id.* § 2.107(l)(2)(iii). To qualify for a fee waiver, disclosure should “contribute to the understanding of a reasonably broad audience of persons interested in” the subject matter of the

¹ See 33 U.S.C. § 1342(d); Amendment to the National Pollutant Discharge Elimination System Memorandum of Agreement between the New York State Department of Environmental Conservation and the U.S. Environmental Protection Agency, Region II Relating to General Permits (Oct. 15, 1992) (“Memorandum of Agreement”), attached hereto as Exhibit 2.

FOIA request, as opposed to the “individual understanding” of the requester. *Id.* In evaluating a fee waiver request, EPA considers whether the requester has “expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.* Federal courts have held that public interest groups satisfy this requirement where they demonstrate an “ability to understand and disseminate the information.” *Judicial Watch, Inc. v. Dep’t of Justice*, 122 F. Supp. 2d 5, 10 (D.D.C. 2000). Here, Riverkeeper’s expertise in mitigating water pollution from CAFOs and track record of conveying this expertise to the public weigh in favor of granting of a fee waiver.

Riverkeeper is a member-supported watchdog organization dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson Valley residents. For more than 50 years Riverkeeper has stopped polluters, championed public enjoyment of the Hudson River and its tributaries, and restored habitat, benefiting the natural and human communities of the Hudson River and its watershed. Riverkeeper has made preventing nutrient pollution from agricultural operations a top priority, as a number of Hudson River tributaries have become impaired due to agricultural operations.

Public interest in the subject matter of the instant FOIA request is demonstrated by the fact that over 750 individuals signed on to a letter transmitted by Riverkeeper to NYSDEC highlighting deficiencies in the draft NYSDEC CAFO General Permit. Moreover, Riverkeeper has been a party to multiple lawsuits against NYSDEC regarding its permitting of CAFOs, including a pending case alleging that the recently-issued NYSDEC CAFO General Permit fails to assure compliance with the federal Clean Water Act and associated regulations. Disclosure of the requested records will allow Riverkeeper to assess how EPA exercised its oversight responsibilities in regards to NYSDEC’s permitting of CAFOs subject to Clean Water Act regulations. Riverkeeper will draw on its institutional expertise to analyze the interaction between state and federal regulation of CAFOs in New York State, and it can educate its members and the general public on these matters via its website, blog postings, social media postings, weekly electronic mailings to roughly 2,800 members, and earned media coverage in newspaper, radio and television. Riverkeeper also participates in panel discussions, debates, film screenings, conferences, presentations, hearings, rallies and other outreach events, at which information on EPA’s oversight of the NYSDEC CAFO General Permit can be distributed.

For these reasons, Riverkeeper is well-situated to contribute to public understanding of the subject area, and therefore satisfies this factor in its request for a fee waiver.

Factor 4: Disclosure of the Requested Records Will Make a “Significant” Contribution to the Public’s Understanding of EPA’s Oversight of the NYSDEC CAFO General Permit

The fourth factor EPA considers is whether the records are “likely to contribute ‘significantly’ to public understanding of government operations or activities.” 40 C.F.R. § 2.107(l)(2)(iv); *see also Fed. CURE v. Lappin*, 602 F. Supp. 2d 197, 205 (D.D.C. 2009) (the relevant test is whether public understanding will be increased after disclosure, as opposed to the public’s understanding prior to the disclosure). Where information is not currently available to the general public, and where “dissemination of information . . . will enhance the public’s understanding,” the fourth public interest factor is satisfied. *Fed. CURE*, 602 F. Supp. 2d at 205.

Here, the request satisfies the fourth factor because at present the public has almost no knowledge about how EPA exercised its oversight of NYSDEC CAFO General Permit to assure compliance with federal law. EPA maintains certain rights over NYSDEC-issued general permits, but it is not clear to the general public how the federal government went about evaluating NYSDEC's proposed permit's compliance with key provisions of federal law or what actions it considered in response to noted deficiencies. Given that so little is known about this topic, disclosure of the requested records will inevitably make a "significant" contribution to public understanding in this regulatory area.

B. There is no Commercial Interest in Disclosure of the Requested Records

In addition, the second fee waiver requirement – that the request “is not primarily in the commercial interest of the requester,” 40 C.F.R. § 2.107(l)(1) – is also met here. The requester, Riverkeeper, is a 501(c)(3) nonprofit organization and does not have any “commercial interest that would be furthered by the requested disclosure” of information.² *Id.* § 2.107(l)(3)(i). Indeed, Riverkeeper's sole interest in obtaining the requested information is to broaden public understanding of EPA's oversight of NYSDEC's permitting of CAFOs, and to undertake advocacy efforts aimed at protecting New York State's waters by improving EPA oversight of CAFOs under the Clean Water Act, if appropriate. Riverkeeper exists solely for the purpose of safeguarding water in New York State and seeks no commercial benefit for this work.

* * *

For the foregoing reasons, Riverkeeper is entitled to a fee waiver for this request. In the event that fees are not waived, please notify and inform us of the basis for your decision, as required by FOIA.

CONCLUSION

Per FOIA and EPA regulations, we expect a reply within twenty working days, *see* 5 U.S.C. § 552(a)(6)(A)(i); 40 C.F.R. § 2.104(a), and at minimum this reply “must . . . indicate within the relevant time period the scope of documents [EPA] will produce.” *Citizens for Responsibility & Ethics in Washington v. Fed. Election Comm'n*, 711 F.3d 180, 182–83 (D.C. Cir. 2013). We appreciate your expeditious help in obtaining the requested information. Please promptly make available copies of all requested records, either through the FOIA Online system, or via mail/email at the contact information below:

Alok Disa
Earthjustice
48 Wall Street, 19th Floor
New York, NY 10005

² Indeed, the legislative history of the fee waiver provision reveals that it was added to FOIA “in an attempt to prevent government agencies from using high fees to discourage certain types of requesters, and requests,” in particular those from journalists, scholars and nonprofit public interest groups. *See Ettlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

Email: adisa@earthjustice.org

If you find that this request is unclear or if the responsive records are voluminous please contact me at (212) 845-7386 to discuss the proper scope of this request.

Thank you in advance for your assistance with this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Alok Disa', with a long horizontal stroke extending to the right.

Alok Disa

EXHIBIT 1



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

September 30, 2015

OFFICE OF
ENVIRONMENTAL INFORMATION

Ms. Eve C. Gartner
Earthjustice
48 Wall Street
19th Floor
New York, NY 10005

RE: Request Tracking Number EPA-HQ-2015-010876

Dear Ms. Gartner:

This is in response to your request for a waiver of fees in connection with your Freedom of Information Act (FOIA) request to the U.S. Environmental Protection Agency (EPA) seeking a copy of records regarding White Pater on Winter Manure Application and related records, as described in your request.

We have reviewed your submission and based on the information provided, we are granting your request for a fee waiver. However, this fee waiver does not include a waiver of fees for otherwise publically available records. The EPA Office of Water will respond to your information request for the Agency.

If you have any questions concerning this fee waiver determination, please contact me at (202) 566-1667.

Sincerely,


Larry F. Gottesman
National FOIA Officer

EXHIBIT 2



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 28 1975

WY032

THE ADMINISTRATOR

Dear Governor Carey:

I am delighted to inform you that the State of New York's request for approval to conduct a State permit program pursuant to the provisions of the National Pollutant Discharge Elimination System (NPDES) under section 402 of the Federal Water Pollution Control Act Amendments of 1972 (the Act) is hereby approved. Accordingly, as of this date I am suspending the issuance of permits by the Environmental Protection Agency (EPA) under section 402(a) of the Act as to all discharges in the State of New York other than those from agencies and instrumentalities of the Federal Government.

The program that you conduct pursuant to this authority must at all times be in accordance with section 402 of the Act, all guidelines promulgated pursuant to section 304(h)(2) of the Act, and the enclosed Memoranda of Agreement between the Regional Administrator of EPA's Region II, the Commissioner of the State of New York's Department of Environmental Conservation (DEC) and the Chairman of the New York State Board on Electric Generation Siting and the Environment (the Board), which I have also approved today. Because of the split in permitting authority between the DEC and the Board, I believe it is extremely important to the effective implementation of the State program that close cooperation between these State agencies be maintained, particularly regarding the issuance of certificates of environmental compatibility and public need (certificates) by the Board to major steam electric generating facilities.

It is equally important that there be effective enforcement of permits and the permit program. The Memoranda of Agreement, which indicate that the Regional Administrator generally intends to undertake direct enforcement of State issued permits or certificates only when the State does not take appropriate enforcement action, are not intended to and will not foreclose federal enforcement action in any case where EPA determines that a violation has occurred and federal enforcement proceedings are warranted.

I understand that several adjustments and clarifications are being made to the New York permit program in order to avoid any uncertainty as the program is being implemented. For example, there was some ambiguity concerning the burden of proof in connection with New York's thermal water quality standards. That ambiguity has been substantially resolved as a result of a September 5, 1975, DEC legal opinion. My approval of the New York program today is based in part upon assurances that the Attorney General of New York agrees with the DEC on the thermal water quality standard burden of proof question and has rendered a supplemental opinion on this issue.

I also understand the Attorney General's Statement has been supplemented to reflect legislative amendments enacted subsequent to the date of the original Statement and to reflect the State Pollutant Discharge Elimination System (SPDES) regulations which became effective on August 29, 1975. This supplement will be most helpful in completing the record and informing the public of the positive actions taken by the New York Legislature and the DEC to prepare for administration of the State's permit program.

Finally, the Public Service Commission's regulations regarding the issuance of certificates by the Board must be revised in conformance with applicable NPDES provisions set forth in 40 CFR Part 124. It is my understanding that the necessary revisions will be finally adopted by the Board prior to its issuance of any certificates to new electric power generating facilities. I am delighted to know that the effort to revise the regulations is underway and have no doubt that the revised regulations will be promulgated in the near future.

As currently in effect, the DEC's SPDES regulations, in section 751.3, exclude certain categories of point sources from New York's SPDES permit program. These exclusions were authorized by section 124.11 of EPA's regulations setting forth guidelines for State NPDES programs, 40 CFR Part 124 (37 FR 28390; December 22, 1972). However, the District Court for the District of Columbia in the recent case of Natural Resources Defense Council, Inc. v. Train (Civil No. 1629-73), held that the Act does not authorize such exclusions and, in an order issued June 10, 1975, directed EPA to amend its regulations accordingly. EPA has filed a Notice of Intent to Appeal the Court's decision. Should the Court order be upheld, however, EPA will be required to publish final amendments to its regulations by February 1976 to remove the exclusions from the NPDES program. Following such amendments New York would similarly be required to amend its regulations in order to continue to comply with the NPDES requirements. We are

holding hearings and soliciting suggestions to minimize the potential impact of the program changes required by the Court order. We welcome any suggestions that you or your staff may make to assist us in this effort.

The State of New York has demonstrated great capability, patience, and cooperation in the development of its permit program. You, your staff, the New York Legislature, and personnel of the DEC should feel justifiable pride and satisfaction upon assuming administration of this important environmental program.

We look forward to working with you and the DEC in continuing the progress you have made towards cleaner water in New York.

Sincerely yours,

Deputy

for

Russell E. Train

Honorable Hugh L. Carey
Governor of New York
Albany, New York 12224

Enclosures

cc: Mr. Ogden Reid, Commissioner, State of New York
Department of Environmental Conservation

Mr. Alfred E. Kahn, Chairman, State of New York
Board on Electric Generation Siting and the Environment

Mr. Louis J. Lefkowitz, State of New York
Attorney General

bcc: AX (3)
OF Chron & Reading, EN-329
B. Emmett, EN-338
J. Molloy, EN-338
J. Bell, EN-338
Regional Administrator, Region II
✓ Regional Counsel, Region II
Enforcement Division, Region II

Prepared by JBell/cmc/9-16-75/EN-338/x58731
Rewritten by BEmmett/cmc/9-25-75/EN-338/x58731

MEMORANDUM OF AGREEMENT
BETWEEN
THE CHAIRMAN OF THE NEW YORK STATE
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT
AND
THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION II

WHEREAS, the Federal Water Pollution Control Act Amendments of 1972 ("the FWPCA") expresses the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce and eliminate pollution;

WHEREAS, the State of New York has had enforceable water quality standards since 1950 and has administered a State discharge permit system since 1962, and since September 1, 1973 the State of New York ("the State") has conducted a State Pollutant Discharge Elimination System ("SPDES") permit program pursuant to article 17, title 8 of the Environmental Conservation Law ("ECL");

WHEREAS, pursuant to the FWPCA, the Administrator of the United States Environmental Protection Agency ("the Administrator" and the "Agency", respectively) is authorized to establish and administer a National Pollutant Discharge Elimination System ("NPDES") for discharges of pollutants into navigable waters of the United States;

WHEREAS, the FWPCA allows the Administrator to suspend the issuance of federal discharge permits within any State which desires to administer its own permit program for discharges into navigable waters within its jurisdiction in accordance with a program meeting the criteria set forth in § 402 of the FWPCA and regulations set forth in 40 CFR Part 124 "State Program Elements Necessary for Participation in the National Pollutant Discharge Elimination System" ("the State Program Elements");

WHEREAS, the State has promulgated regulations under article 17, title 8 of the ECL, and has taken other necessary steps in order to meet said criteria;

WHEREAS, the State, acting through its Governor, has submitted an application for approval by the Administrator of the State's pollutant discharge elimination system permit program;

WHEREAS, the Regional Administrator, Region II, United States Environmental Protection Agency ("the Regional Administrator") and the Chairman of the New York State Board on Electric Generation Siting and the Environment (hereinafter the "Chairman" and the "Board", respectively) wish to set forth their mutual understanding as to procedural and other arrangements for coordinating the administration of the State's pollutant discharge elimination system permit program for major steam electric generating facilities as defined in Section 140(2) of the New York Public Service Law ("generating facilities") with the NPDES program following approval by the Administrator of the State's program;

WHEREAS, the Administrator has promulgated regulations, the State Program Elements, which call for, among other things, the establishment by agreement between the Regional Administrator and the appropriate State agency of procedures for transmission of certain data and other information concerning the NPDES program to the Regional Administrator;

WHEREAS, the Board is authorized pursuant to article 17, title 8 ECL to administer an NPDES program for generating facilities on behalf of the State, and its Chairman is authorized to enter into agreements with the Regional Administrator incidental to that authority;

NOW, THEREFORE, the parties to this agreement, in consideration of the covenants and stipulations set out herein, agree as follows:

ARTICLE I

TRANSFER OF AUTHORITY

1. After the date upon which the Administrator approves the State's permit program, all pending and new applications for NPDES permits for generating facilities (hereinafter "certificates of environmental compatibility and public need" or "certificates") shall be directed to the Chairman.

2. After the date upon which the Administrator approves the State's permit program, the Board shall have sole responsibility for the issuance of certificates within the State of New York.

ARTICLE II

RECEIPT AND USE OF DATA

1. The Regional Administrator agrees that he will maintain all the files containing the documents upon which NPDES permits issued by him were based in a readily accessible condition and that employees of the Departments represented on the Board will be permitted unlimited access to such documents on five (5) days prior notice to the Regional Administrator or his designee. Any documents required by the Departments will be furnished or reproduced by EPA promptly and without charge to the Departments.

2. The Chairman hereby agrees that he will provide to the Regional Administrator periodic, statistical reports on all applications for certificates received by him, and on the progress of all applications for certificates before the Board.

ARTICLE III

TRANSMITTAL OF APPLICATIONS FOR CERTIFICATES TO THE REGIONAL ADMINISTRATOR

1. The Chairman hereby agrees that for all applications for certificates before the Board for which the Regional Administrator has not waived his right to object to, review and received information pursuant to Section 402(d) of the FWPCA, the Chairman will transmit to the Regional Administrator a copy of those portions of the application pertaining to NPDES and the related public notices, the recommendations of the Public Service Commission Staff or the Department of Environmental Conservation Staff, or both, pertaining to NPDES, the fact sheet, and the rationale detailing the basis for the limits appearing in the staff recommendations at the time of the publication of public notice of the staff recommendations. The Regional Administrator shall be afforded a period of thirty (30) days from receipt of such documents during which to make written comments upon, objections to, or recommendations with respect to such staff recommendations.

2. The Chairman agrees that if any staff recommendation received by the Regional Administrator pursuant to paragraph 1 of this Article is substantially changed subsequent to the initial transmission to the Regional Administrator, the Chairman shall so notify the Regional Administrator and shall transmit to the Regional Administrator a copy of such changed recommendations. The Regional Administrator shall have a period of twenty (20) days from receipt of such changed recommendations during which to make written comments upon, objections to, or recommendations with respect to such changes prior to the issuance of the certificate. For the purposes of this paragraph, a substantial change in a staff recommendation is a change which either results in the increase of any effluent load (which may be expressed as a percentage of influent allowed to be discharged) by more than 20 percent, provided, however, that such effluent load remains consistent with federal guidelines and requirements, or extension of the final date of compliance in any schedule of compliance more than 60 days after the date set forth in the original staff recommendation.
3. If the Regional Administrator so requests in writing, the Chairman shall extend the period of time during which the Regional Administrator may make written comment upon, objection to, or recommendations with respect to any staff recommendation, except that in no event will the total of time, as extended, be greater than 90 days from the original receipt of the staff recommendation.
4. If the Regional Administrator objects to any portion of a certificate relating to NFDES proposed to be issued pursuant to his right to object provided in Section 402(d)(2) of the FWPCA, such objection shall be in writing, shall state with particularity the provisions of the FWPCA or regulations, guidelines and national program guidance adopted thereunder upon which the objection is based, and shall set forth the terms and conditions required by the Regional Administrator as a condition to elimination of his objections to those portions of the certificate. Whenever the Regional Administrator objects to those portions of the certificate pertaining to NFDES, no certificate shall be issued by the Board until all objections of the Regional Administrator have been resolved. The Regional Administrator and the Chairman agree to seek resolution of any objections the Regional Administrator may have in as expeditious a manner as is possible. When an objection of the Regional Administrator has been resolved to

his satisfaction, he shall notify the Chairman in writing of the withdrawal of his objection.

5. The Board may impose additional requirements, limitations and conditions as it deems necessary as long as such requirements, limitations and conditions are not less stringent than federal guidelines and requirements.

ARTICLE IV

RECEIPT OF CERTIFICATES AFTER ISSUANCE

Notwithstanding any other provision of this Agreement, the Chairman agrees to transmit a copy of every certificate and modifications thereto issued by the Board to the Regional Administrator no later than thirty (30) days after the issuance of such certificate and modifications thereto.

ARTICLE V

MONITORING AND REPORTING

1. The Board, in accordance with § 124.61 of the State Program Elements and 3 NYCRR 756.1, shall include monitoring conditions in certificates, and shall establish such monitoring requirements for additional pollutants in any certificates, as may be required.

2. The Chairman agrees that copies of all reports to be submitted by the certificate holder to the Chairman or the Board shall also be submitted to the Regional Administrator.

3. Recognizing that the New York State Departments of Environmental Conservation and Health have the responsibility for monitoring discharges under section 17-0823 of the ECL, whenever the Chairman or his designee receives a monitoring report from any source, other than such Departments, relating to a discharge from a generating facility, the Chairman shall transmit to the Regional Administrator and the Department of Environmental Conservation the results of that report.

ARTICLE VI

TRANSMITTAL OF DATA TO THE NATIONAL DATA BANK

1. Until a national repository of information is permanently established, the Regional Administrator will perform this function with regard to NPDES permits. Therefore, transmission by the Chairman or his designee of all documents required in previous Articles shall satisfy the requirement of transmittal of data to the National Data Bank.
2. The Chairman and the Regional Administrator shall cooperate in providing each other, in a timely manner, basic information and data needed to carry out their respective programs.

ARTICLE VII

MODIFICATIONS OF CERTIFICATES

1. Whenever the Board intends to modify those portions of the certificate pertaining to NPDES, the Chairman shall notify the Regional Administrator, and shall transmit a copy of any certificate which is proposed to be so modified or revised to the Regional Administrator, together with the proposed changes.
2. The Regional Administrator shall be afforded a period of thirty (30) days following such notice or receipt of such transmitted changes, whichever shall occur later, to comment upon, make recommendations with respect to, or object to the proposed modifications and revisions. If no objections are made within the 30-day period, the Board may issue the modified certificate.
3. If any portion of a certificate relating to NPDES is revised or modified in any manner by court action, the Chairman or his designee shall notify the Regional Administrator of such revision or modification and, upon request, shall transmit a copy of such certificate with the changes to the Regional Administrator. Where implementing action by the Board is required by the court, the Board, unless prohibited by court order, shall, prior to taking such implementing action, allow the Regional Administrator a period of ten (10) days following such notice or receipt of such transmittal, whichever shall later occur, in

which to appeal the court's decision.

ARTICLE VIII

NOTIFICATION OF VIOLATIONS

Whenever the Regional Administrator receives any information that any certificate holder is in violation of any term or condition of any issued certificate, he shall immediately forward a copy of such information to the Chairman and Commissioner of Environmental Conservation.

ARTICLE IX

ASSISTANCE

From time to time the Chairman and the Regional Administrator shall consult as to whether or not it will be necessary for the Regional Administrator to assist the Board in carrying out its responsibilities under this agreement. Such assistance shall be rendered as the Chairman and Regional Administrator may agree.

ARTICLE X

CHANGES IN STATE STATUTES, REGULATIONS, OR DIRECTIVES

1. Prior to taking any action to propose or effect any substantial amendment, rescission, or repeal of any statute, regulation, or directives, which the Chairman has submitted to the Regional Administrator or agreed to make use of in connection with approval of the State's program, the Chairman shall notify the Regional Administrator by transmittal of the text of any such change to the Regional Administrator. The Regional Administrator shall have 30 days in which to determine whether the proposed change would mean that the State's permit program would not be in accordance with the FWPCA and the State Program Elements.

2. If an amendment, rescission, or repeal of any statute, regulation, or directive, described in paragraph 1 above

shall occur for any reason, including action by the New York Legislature or a court, the Chairman shall notify the Regional Administrator by transmittal of a copy of the text of such revision to the Regional Administrator.

ARTICLE XI
FURTHER ASSURANCES

The Chairman shall seek the adoption of such regulations, and shall take all further actions which may be needed in order to preserve and maintain any authorities, programs, or commitments described in this Agreement.

ARTICLE XII
ACTION THROUGH STAFF PERSONNEL

The Chairman and the Regional Administrator may designate personnel to carry out any duty or action required or described herein.

ARTICLE XIII
EFFECT AND RESCISSION

This Agreement shall take effect upon program approval by the Administrator pursuant to § 402(b) of the FWPCA and shall remain in effect for the duration of such approved program or until this Agreement is rescinded.

In witness whereof, the parties have executed this agreement on this 14th day of August, 1975.

STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION II

By: Alfred E. Kahn
Alfred E. Kahn
Chairman

By: Gerald M. Hansler
Gerald M. Hansler, P. E.
Regional Administrator

Approved: October 8, 1975
(Date)

John Zearles Deputy
Administrator
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

AMENDMENT TO THE
MEMORANDUM OF AGREEMENT
BETWEEN THE BOARD AND EPA

Now therefore, the parties to the Memorandum of Agreement dated August 14, 1975, in consideration of the covenants and stipulations set forth therein, agree to the following supplementary provisions:

(A) Article I, paragraph 3.

3. In carrying out its duties, the Board shall insure full compliance with the substantive content and spirit of the FWPCAA, relevant regulations promulgated under the FWPCAA, and title 8 of article 17 of the Environmental Conservation Law.

(B) The following language shall be added to Article X(1):

If the Regional Administrator objects to any proposed change as not being in compliance with the FWPCAA, or any regulations promulgated thereunder, he shall set forth his objections with reasonable specificity. The Chairman and the Regional Administrator agree to seek resolution of any objections the Regional Administrator may have in as expeditious a manner as possible.

(C) The following language shall be added to Article XI.

Before the Board issues any certificate, the Commission shall revise its regulations to insure full

compliance with the FWPCAA, any relevant regulations promulgated thereunder, and with title 8 of article 17 of the Environmental Conservation Law.

In witness whereof, the parties have executed this agreement on this 8th day of September, 1975.

STATE OF NEW YORK
BOARD ON ELECTRIC GENERATION
SITING AND THE ENVIRONMENT

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY
REGION II

By: Alfred E. Kahn
Alfred E. Kahn
Chairman

By: Gerald M. Hansler, P. E.
Acting Regional Administrator

Approved: October 18, 1975
(Date)

John Zuccharles Deputy
for Administrator
United States Environmental
Protection Agency



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 16 1980

OFFICE OF ENFORCEMENT

Honorable Hugh Carey
Governor of New York
Albany, New York

Dear Governor Carey:

On October 28, 1975, New York received authority to administer the National Pollutant Discharge Elimination System (NPDES) within its borders. EPA's approval letter indicated that we would retain authority to issue permits for Federal facilities within the State. The reservation of authority over Federal facilities was necessary because the Federal Water Pollution Control Act (FWPCA) precluded State regulation of these facilities.

The 1977 amendments to the FWPCA specifically authorize the States to administer the NPDES permit program for Federal facilities. Accordingly, I have today approved the State of New York's request to assume this responsibility. This approval overrides any contrary language in EPA's October 28, 1975 letter approving the State's NPDES program.

We are glad to transfer the administration of the NPDES permit program for Federal facilities to the State of New York. Region II will be working with the New York State Department of Environmental Conservation and the New York State Board on Electric Generation Siting and the Environment to facilitate this transfer in a timely manner.

Sincerely yours,

A handwritten signature in dark ink, appearing to read "Jeffrey G. Miller", is written over the typed name.

Jeffrey G. Miller
Acting Assistant Administrator
for Enforcement

cc: Mr. Robert F. Flacke
Honorable Chas. Zielinski
Mr. Charles S. Warren

ORIGINAL FILED IN
FILE 30-11-11

AMENDMENT TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II
RELATING TO GENERAL PERMITS

The Memorandum of Agreement between the United States Environmental Protection Agency, Region II (hereinafter EPA) and the Department of Environmental Conservation (hereinafter DEC) is hereby amended to include DEC and EPA responsibilities for the development, issuance and enforcement of National Pollutant Discharge Elimination System (hereinafter NPDES) general permits as follows:

The DEC has the responsibility for developing and issuing NPDES general permits. After identifying dischargers appropriately regulated by a general permit, the DEC will collect sufficient effluent data to develop effluent limitations and prepare the draft general permit.

The DEC will include in each general permit conditions which require the permittee(s) to comply with the following provisions of 40 CFR §122.28.

- §122.28(b)(2) notices of intent
- §122.28(b)(3)(i) requiring dischargers to apply for and obtain an individual permit; petitions by interested parties
- §122.28(b)(3)(iii) providing that a general permit holder may request to be excluded from coverage under the general permit by applying for an individual permit
- §122.28(b)(3)(iv) providing that when an individual permit is issued to a discharger subject to a general permit, the applicability of the general permit is automatically terminated on the effective date of the individual permit
- §122.28(b)(3)(v) providing that a source excluded from a general permit solely because it already has an individual permit may request that the individual permit be revoked, and that it be covered under the general permit which shall apply to the source upon revocation of the individual permit

Each draft general permit will be accompanied by a fact sheet setting forth the principal facts and methodologies considered during permit development and will be transmitted to the following EPA offices:

Water Management Division Director
U.S. EPA, Region II
26 Federal Plaza
New York, NY 10278

Director, Office of Wastewater Enforcement and Compliance*
U.S. EPA (WH-546)
401 M Street, SW
Washington, D.C. 20460

EPA will have up to ninety (90) days to review draft general permits and provide comments, recommendations and objections to the DEC. In the event EPA does object to a general permit it will provide, in writing, the reasons for its objection and the actions necessary to eliminate the objection. The State has the right to a public hearing on the objection in accordance with 40 CFR §123.44 and Article III of the MOA. If the state does not request a public hearing within ninety (90) days of receipt of the objections and EPA's objections are not withdrawn, exclusive authority to issue the general permit passes to EPA. If the state does request a public hearing, one will be held, and a decision will be made which reaffirms the original objections, modifies the terms of the objections, or withdraws the objections. The state will be given notification of this decision. If the state does not resubmit a draft general permit in response to the decision within thirty (30) days of the notification, exclusive authority to issue the general permit passes to EPA.

At the time the DEC transmits a copy of the draft general permit to EPA, the DEC will also publicly notice the draft general permit in accordance with 6 NYCRR Part 621, including publication in the Environmental Notice Bulletin. The DEC will also issue and administer general permits in accordance with 6 NYCRR Part 621 and 40 CFR §122.28.

The DEC also has the primary responsibility for conducting compliance monitoring activities and enforcing conditions and requirements of general permits.

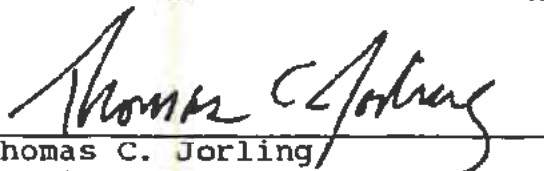
All specific State commitments regarding the issuance and enforcement of general permits will be determined through the

*General permits for discharges from separate storm sewers need not be sent to EPA Headquarters for review.

annual 106 workplan/SEA process.

This Amendment to the Memorandum of Agreement will be effective upon approval of the DEC general permit program application by the Regional Administrator of EPA Region II.

New York State Department
of Environmental Conservation



Thomas C. Jorling
Commissioner

Dated: Albany, New York
September 17, 1992

United States Environmental
Protection Agency



Constantine Sidamon-Eristoff
Regional Administrator

Dated: New York, New York
October 15, 1992

1/26/89
FYE
C. L. Jones

**AMENDMENT TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II
RELATING TO IMPLEMENTATION OF THE REQUIREMENTS
OF THE GREAT LAKES WATER QUALITY GUIDANCE
IN THE GREAT LAKES BASIN**

I. Background

1. The Great Lakes Water Quality Guidance (GLWQG) is found at 40 C.F.R. Part 132 and is the result of a six-year effort begun by the eight Great Lakes States and EPA in 1989 to develop more consistent water quality standards in the Great Lakes Basin.
2. The GLWQG establishes minimum water quality criteria (including for the first time criteria to specifically protect wildlife), antidegradation policies, and implementation procedures using an ecosystem approach for waters of the Great Lakes Basin within the States of Illinois, Indiana, Michigan, Minnesota, New York, Pennsylvania, Ohio and Wisconsin, including waters within the jurisdiction of Indian tribes. These procedures will be used to establish "consistent" water quality goals and to control point and nonpoint source discharges from industrial and municipal facilities within the Great Lakes Basin.
3. The New York State Department of Environmental Conservation (NYSDEC) has adopted certain methodologies, policies and procedures to meet the requirements of the GLWQG and has submitted them to EPA for review. In certain instances, these methodologies, policies and procedures will be implemented through the NYSDEC's SPDES permit program. EPA and NYSDEC are entering into this Amended Memorandum of Agreement (MOA) to ensure that the methodologies, policies and procedures implemented through the SPDES permit program within the Great Lakes System in New York State are consistent with the GLWQG found at 40 C.F.R. Part 132.
4. The duties in this MOA apply only to those portions of NYSDEC's SPDES permit program which concern discharges to the Great Lakes System in New York.

II. Technical Operational Guidance Series (TOGS)

1. The NYSDEC has used a series of documents, known as the Technical Operational Guidance Series (TOGS), as the basis for providing NYSDEC staff with the technical guidance necessary to implement the State's water quality protection program for over twenty years. Therefore, NYSDEC has elected to implement certain requirements of the

GLWQG through the continued use of these TOGS. NYSDEC has modified the applicable TOGS to be consistent with the requirements of the GLWQG.

2. The applicable State TOGS which have been modified by NYSDEC to comply with the requirements of the GLWQG, and will be used by the State to implement these GLWQG-based requirements are:
 - TOGS 1.1.3: Procedures for Derivation of Site-specific Standards and Guidance Values for Protection of Aquatic Life;
 - TOGS 1.1.4: Procedures for Derivation of Bioaccumulation Factors;
 - TOGS 1.1.5: Procedures for Deriving Ambient Water Quality Standards and Guidance Values for the Protection of Wildlife;
 - TOGS 1.2.1: Industrial Permit Writing;
 - TOGS 1.3.1: Total Maximum Daily Loads and Water Quality-Based Effluent Limits;
 - TOGS 1.3.2: Toxicity Testing in the SPDES Program;
 - TOGS 1.3.3: SPDES Permit Development for POTW's; and,
 - TOGS 1.3.9: Implementation of the NYSDEC Antidegradation Policy - Great Lakes Basin (Supplement to Antidegradation Policy dated September 9, 1985).

IIA. Purpose

1. The purpose of this MOA is to set forth the basic covenants and commitments between EPA Region II and the NYSDEC, with respect to NYSDEC's use of TOGS to issue SPDES permits in the Great Lakes Basin in conformance with the requirements of the GLWQG.
2. EPA Region II and the NYSDEC hereby agree that it is NYSDEC's full intention to implement its water quality program for waters of the Great Lakes System in a manner that is consistent with (as protective as) the GLWQG. SPDES permits issued in the Great Lakes Basin will follow the procedures included in the applicable State TOGS.

IIB. NYSDEC and EPA Responsibilities

1. Under this Amended MOA, NYSDEC agrees that in order to implement the requirements of the GLWQG, as found at 40 C.F.R. Part 132, it will issue SPDES permits in the Great Lakes Basin in accordance with the procedures included in the applicable State TOGS.

2. If for any reason, on a case by case basis, NYSDEC is unable, or does not believe it is appropriate, to follow the procedures included in the TOGS in issuing a SPDES permit in the Great Lakes Basin, NYSDEC shall submit such permit for review by EPA Region II, notwithstanding any other provision in the MOA that might waive EPA review. NYSDEC shall specifically note in its transmittal to EPA and in the fact sheet or statement of basis for the permit, its decision to depart from the TOGS and rationale for doing so.
3. Both NYSDEC and EPA understand that should NYSDEC not follow the TOGS in any particular case, EPA would have the authority to object to the SPDES permit pursuant to 40 C.F.R. 123.44(c)(3) and (c)(9).
4. Any revisions to the above referenced TOGS with respect to the GLWQG shall be submitted to EPA in accordance with 40 C.F.R. Section 123.62(a).

III. Variances


1. The NYSDEC has revised its regulations at 6 NYCRR §702.17 to enable the State to grant variances similar to those allowed in 40 C.F.R. Part 132, Appendix F, Procedure 2 of the GLWQG. To ensure that any variance granted pursuant to 6 NYCRR §702.17 is consistent with and as protective of water quality as variances that would be issued under 40 C.F.R. Part 132 Appendix F, Procedure 2, EPA and NYSDEC agree as follows:
2. Upon receipt of a complete SPDES application in accordance with 6 NYCRR 621, which includes a request for a variance, NYSDEC shall submit a copy of such request to Region II.
3. If NYSDEC determines that the variance request should be issued in accordance with the requirements of 6 NYCRR Part 702.17, it shall submit a draft permit and explanation of how the variance, if issued, will be as protective as a variance issued in accordance with 40 C.F.R. Part 132 Appendix F, Procedure 2, to EPA Region II on or before the date it notices said permit and variance request in the State's Environmental Notice Bulletin.
4. EPA Region II shall be granted at least 30 days, but no longer than the public comment period, to review and comment on NYSDEC's explanation that the variance would be as protective as a variance issued in accordance with the GLWQG.
5. In the event that EPA provides comments on the proposed application, NYSDEC shall consider EPA's comments to the explanation and proposed variance and prepare a written response to EPA's comments.
6. Upon submission of NYSDEC's response to EPA Region's comments on the explanation, EPA shall have 30 days to provide additional comments.

7. Nothing in this MOA obviates the NYSDEC's obligations to conform with the public notice, comment and hearing requirements contained in its regulations at 6 NYCRR Parts 621 and 624.
8. If EPA determines that the explanation provided by NYSDEC does not demonstrate that the granting of a variance pursuant to 6 NYCRR Section 702.17 would be as protective as that which would be required by 40 C.F.R. Part 132, Appendix F, Procedure 2, it may object to the issuance of such variance in the permit as being outside the guidelines and requirements of the Act. If EPA determines that the explanation supporting the issuance of the variance demonstrates the variance is as protective as that which would be required by 40 C.F.R. Part 132, Appendix F, Procedure 2, EPA will not object to the issuance of the permit or modification based solely on the grounds that the permit contains a variance to a water quality-based effluent limit.
9. In accordance with the Environmental Benefit Permit Strategy (EBPS), NYSDEC will give priority review for any permit containing a variance granted under 6 NYCRR Section 702.17 to assess whether there is new information which indicates that the standard in question is achievable.

IV. Effective Date

This MOA shall become effective upon the later of the date that all applicable TOGS have been approved by NYSDEC's Commissioner or the date that the revisions to NYCRR Parts 700-706 become effective. This MOA shall become void in the event that EPA Region II does not approve all or part of NYSDEC's submission in accordance with the GLWQG.

New York State Department of
Environmental Conservation


N.G. Kaul
Director, Division of Water

Dated: Albany, New York
FEB 25 1998

United States Environmental
Protection Agency


Jeanne M. Fox
Regional Administrator

Dated: New York, NY
3-16-98

**AMENDMENT
TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN
THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2
RELATING TO IMPLEMENTATION OF THE REQUIREMENTS OF
THE GREAT LAKES WATER QUALITY GUIDANCE
IN THE GREAT LAKES BASIN**

The federal Water Quality Guidance for the Great Lakes System (Guidance), 40 CFR Part 132, contains the minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes system to protect human health, aquatic life, and wildlife. The Great Lakes states were required to adopt provisions consistent with (as protective as) the Guidance for their waters within the Great Lakes system. The New York State Department of Environmental Conservation (NYSDEC) submitted revisions to water quality standards and implementation procedures to the U.S. Environmental Protection Agency Region 2 (EPA) on February 27, 1998. These rules and revisions to the NYSDEC Division of Water's Technical and Operational Guidance Series (TOGS) became effective on or before March 12, 1998.

EPA and NYSDEC enter into this Amendment to their National Pollutant Discharge Elimination System (NPDES) Memorandum of Agreement to ensure that New York State implements its authorities with respect to the waters of the Great Lakes system in a manner consistent with the Guidance.

I. Applicability of Modified Water Quality-Based Effluent Limits (WQBELs) taking into account treatability, analytical detectability and natural background (6 NYCRR 702.16(b))

6 NYCRR 702.16(b) states that where factors, including but not limited to analytical detectability, treatability, natural background levels and the waste assimilative capacity of the receiving waters indicate that achieving a WQBEL would be clearly unreasonable, NYSDEC may substitute a modified effluent limit.

NYSDEC and EPA Region 2 agree that NYSDEC will not utilize 6 NYCRR 702.16(b) as a basis for modifying or otherwise adjusting WQBELs. NYSDEC and EPA Region 2 further agree that when the State computes a WQBEL, based either on a TMDL, or a source specific WLA to attain WQS, and NYSDEC determines that the permit falls within the scope of 6 NYCRR 702.16, the following procedures will be followed:

- The permit shall contain, as the final effluent limit for that pollutant, the WQBEL as calculated (with the WQBEL referring to the limit derived from the WLA that attains water quality standards without consideration of the factors contained in 6 NYCRR 702.16(b)).
- The "compliance levels" mentioned in TOGS 1.2.1 and 1.3.3 that are based on consideration of detectability, treatability and natural background as provided in 6 NYCRR 702.16(b) may constitute interim limits only in those circumstances where such interim limits would be allowed by the compliance schedule procedures contained in 40 C.F.R. Part 132, Appendix F, Procedure 9 or the corresponding approved State procedure.
- Unless NYSDEC and EPA Region 2 agree to an alternate procedure, any such compliance schedule and interim limits which are not consistent with Procedure 9 in Appendix F of the Guidance (Procedure 9) (e.g., where compliance with a new or more restrictive WQBEL is not required until more than five years after the date of issuance or modification of the permit) will be in an enforcement instrument, such as an administrative order; the permit itself will be consistent with Procedure 9.

NYSDEC and EPA Region 2 agree that NYSDEC will not utilize 6 NYCRR 702.16(b) as a basis for modifying or otherwise adjusting WQBELs derived as a result of procedures approved by EPA as being consistent with the Guidance, except when interim limits are allowed by the compliance schedule procedures contained in 40 C.F.R. Part 132, Appendix F, Procedure 9 or the corresponding approved State procedure. In order to ensure that 6 NYCRR 702.16(b) is implemented consistent with the requirements of the Guidance, NYSDEC and EPA Region 2 agree to the following:

1. If NYSDEC drafts a proposed permit to include interim limits based on 6 NYCRR 702.16(b), NYSDEC shall submit the proposed permit to EPA Region II notwithstanding any prior waiver of review by EPA for any category or class of dischargers. When submitting the permit to EPA, NYSDEC shall include a written explanation of how such interim limits are allowed by Procedure 9.
2. EPA Region II shall have 30 days (which period shall be automatically extended upon request by EPA) to provide general comments upon, objections to, or recommendations with respect to the permit, including whether NYSDEC has demonstrated that any interim limits are allowed by Procedure 9.

3. In the event that EPA provides comments on the proposed permit, NYSDEC shall consider EPA's comments and prepare a written response to EPA.
4. Upon submission of NYSDEC's response to EPA Region II's comments on the explanation, EPA shall have 30 days to provide additional comments.
5. If EPA determines that NYSDEC has not demonstrated that interim limits are allowed by Procedure 9, EPA may object to the permit pursuant to 40 C.F.R. § 123.44.
6. In accordance with the Environmental Benefit Permit Strategy (EBPS), NYSDEC will give priority for review to any permit developed under 6 NYCRR 702.16(b). This review will assess whether there is new information which indicates that the standard in question is achievable.
7. Nothing in this MOA obviates the NYSDEC's obligations to conform with the public notice, comment and hearing requirements contained in its regulations at 6 NYCRR Parts 621 and 624, nor does it impair EPA's authority to take 90 days from receipt of a proposed permit to object to a proposed permit. See 40 C.F.R. § 123.44(a)(1).

II. Reasonable Potential Determinations When There is Existing Effluent Data

TOGS 1.2.1 and 1.3.3 include procedures for determining projected effluent quality (PEQ) and making reasonable potential determinations.

NYSDEC and EPA Region 2 agree that NYSDEC will use all existing valid representative data to make reasonable potential determinations and include a WQBEL where reasonable potential is found regardless of the number of data points available for the reasonable potential analysis.

III. Statistically-Based Projected Effluent Quality (PEQ)

TOGS 1.2.1 and 1.3.3 contain procedures for calculating PEQ and making reasonable potential determinations.

NYSDEC and EPA Region 2 agree that for purposes of implementing TOGS 1.3.3 for municipal discharges where there are 10 or more data points which are a mixture of detect and non-detect data, the PEQ will be set at the 99th percentile or, alternatively, based on the method set forth in Procedure 5.B.1 of Appendix F of the Guidance or an alternative method that meets the criteria in Procedure 5.B.2 of Appendix F of the Guidance.

Where there are 10 or more data points *greater than the level of detection*, EPA believes that a point estimate of the 95th percentile without a confidence interval, while less conservative than the procedure in 5.B.1, meets the requirement for an alternative procedure under B.2 of procedure 5 of Appendix F to 40 CFR part 132.

Where there are 9 or fewer data points, the PEQ shall be established by multiplying the maximum observed value by the multiplying factors contained in Table F6-1 of Procedure 5 of Appendix F of the Guidance. Further, when calculating PEQ for industrial discharges in cases where it has 9 or fewer data points for determining reasonable potential, NYSDEC will multiply the maximum observed value by the multiplying factors contained in Table F6-1 of Procedure 5 of Appendix F of the Guidance.

IV. Section 132.4(a)(7) and Appendix F, Procedure 5: Fish Tissue Reasonable Potential and Policy of Independent Applicability

NYSDEC does not have specific provisions for fish tissue reasonable potential and independent applicability as called for in Procedure 5.F. of Appendix F of the Guidance.

NYSDEC and EPA Region 2 agree NYSDEC will determine that reasonable potential exists when a discharger that has a detectable amount of a pollutant discharges to receiving waters where the geometric mean of fish tissue data exceed the fish tissue value upon which a Tier I criterion or Tier II value are based.

In addition, NYSDEC and EPA Region 2 agree that NYSDEC will follow a policy of independent applicability that is consistent with Procedure 5.F.3 of the Guidance, which requires that when determining whether WQBELs are necessary, information from chemical-specific, whole effluent toxicity, and biological assessments shall be considered independently.

V. Consideration of Intake Credits

TOGS 1.2.1 and TOGS 1.3.3 address the consideration of intake pollutants in water quality-based permitting.

NYSDEC and EPA Region 2 agree that intake pollutant procedures will only be utilized if the intake pollutants are from the same body of water (SBOW) as the discharge as defined in Section I.B.9 of TOGS 1.2.1 and Section VI.C.5.a.4 of TOGS 1.3.3. Further NYSDEC will not utilize its intake pollutant procedures to make a finding of no reasonable potential if (1) the facility alters the identified intake pollutant chemically or physically in a manner that would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream, or (2) the timing and location of the discharge would cause adverse water quality impacts to occur that would not occur if the pollutants were left in-stream.

In addition, NYSDEC and EPA Region 2 agree that upon making a finding under NYSDEC's intake pollutant procedure that an intake pollutant in the discharge does not cause, or have the reasonable potential to cause or contribute to an excursion above an applicable water quality standard, NYSDEC will include a statement in the fact sheet that the discharge of the identified intake pollutant will not cause or contribute to violation of water quality standards, and include a monitoring requirement in the permit to assure that the conditions under which the no net addition limits were developed remain the same.

Finally, NYSDEC and EPA Region 2 agree that any no net additional limits included in a permit be expressed as both concentration and mass, and that the permit will specify how compliance with these limits will be assessed, consistent with Procedure 5.E.3.a. in Appendix F of the Guidance.

VI. Whole Effluent Toxicity (WET)

TOGS 1.3.2. contains WET procedures.

NYSDEC and EPA Region 2 agree that when determining whether a WQBEL is needed to protect against acute and chronic toxicity, NYSDEC will use Procedure 6.D in Appendix F of the Guidance.

VII. Need for WQBELs When WET Reasonable Potential Exists

TOGS 1.3.2. contains procedures which address situations where WET reasonable potential is found.

NYSDEC and EPA Region 2 agree that a WQBEL for WET will be included in any permit where reasonable potential is found as a result of following the procedure in TOGS 1.3.2 (implemented in accordance with Section VI of this MOA). NYSDEC may also include a compliance schedule for the WET WQBEL of up to 5 years provided that all applicable compliance schedule requirements under TOGS 1.2.1 and 1.3.3, as well as 40 C.F.R. § 122.47 (implemented in accordance with Section XI of this MOA) are met. NYSDEC may decide on a case-by-case basis that a WQBEL for WET is not necessary, and NYSDEC has demonstrated, in accordance with 40 C.F.R. § 122.44(d)(1)(ii), that a chemical-specific limitations for the effluent is sufficient to attain and maintain applicable numeric and narrative water quality standards for toxicity. A WET WQBEL that is subject to a compliance schedule and has not gone into effect may be removed from the permit if, after the completion of a TIE /TRE, toxicity is eliminated and the subsequent reasonable potential analysis using data collected after the completion of the TIE/TRE concludes no reasonable potential to violate toxicity criteria.

VIII. Loading Limits

TOGS 1.2.1 and TOGS 1.3.3 address loading limits.

NYSDEC and EPA Region 2 agree that:

- In the phrase "unless the variability of the wastewater discharge flow is negligible compared to the flow in the stream" in TOGS 1.2.1, NYSDEC interprets, and will apply, the term "negligible" to mean when the ratio of the 7Q10 stream flow (the lowest average 7 consecutive day low flow with an average recurrence frequency of once in 10 years determined hydrologically) for the receiving stream to the daily maximum effluent flow is greater than 10:1.
- In TOGS 1.2.1 for "storm water dominated discharges" that contain process wastewater, NYSDEC will require both mass and concentration limits for pollutants discharged during high flow events.

IX. WQBELS Below the Level of Quantification (LOQ)

WQBEL as the Enforceable Limit: TOGS 1.2.1 and TOGS 1.3.3 address the development and inclusion of WQBELs in permits when the WQBEL is calculated to be below the LOQ.

NYSDEC and EPA Region 2 agree that:

- NYSDEC will include in the permit the WQBEL, as calculated to meet water quality standards (not the PQL), as the enforceable effluent limit in any permit.
- NYSDEC will include in the permit the statement that, for the purpose of compliance assessment, the analytical method specified in the permit shall be used to monitor the amount of pollutant in an effluent down to the quantification level, provided that the laboratory analyst has complied with the specified quality assurance/quality control procedures in the relevant method.

Minimum Levels (MLs) and Practical Quantification Levels (PQLs): NYSDEC and EPA Region 2 agree that NYSDEC may have 120 days after the promulgation of any future MLs promulgated in 40 CFR Part 136 to compare the new ML to the corresponding PQL in NYSDEC's Detectability Manual. Nevertheless, at no time will NYSDEC issue an NPDES permit that fails to include the ML for the most sensitive analytical method specified in or approved under 40 C.F.R. Part 136, including where the ML for that method is more sensitive than a corresponding PQL in NYSDEC's Detectability Manual.

Reasonable Efforts to Achieve the Minimum Detection Level (MDL) or PQL: In Section I.B.6. and Attachment A (pg 53) of TOGS 1.2.1, the industrial permit language states that the permittee “must make all reasonable efforts” to achieve the MDLs and PQLs cited in the permit.

NYSDEC and EPA Region 2 agree that NYSDEC will require the permittee to monitor down to the ML/PQL, with adjustments to the quantification level based on matrix interference made only by establishing an “alternative” quantification level in the permit as provided in Procedure 8.B.2 in Appendix F of the Guidance.

X. Pollution Minimization Plans (PMPs)

Monitoring Requirements and Frequencies: TOGS 1.2.1, Attachment A, states that at a minimum, the PMP plan shall include “periodic monitoring designed to quantify and, over time, track the reduction of discharges of the substances noted above.”

NYSDEC and EPA Region 2 agree that NYSDEC will require that a permit that contains a WQBEL below the LOQ to include the following monitoring requirements at a minimum for that pollutant, unless less frequent monitoring is appropriate because information generated as a result of a PMP can be used to support a request for subsequent permit modifications, including revisions to (e.g., more or less frequent monitoring), or removal of the PMP, as provided in Procedure 8.D.6 of Appendix F of the Guidance.

- An annual review and semi-annual monitoring of potential sources of the pollutant for which the PMP is required, which may include fish tissue monitoring and other bio-uptake sampling; and,
- Quarterly monitoring for the pollutant in the influent to the wastewater treatment system.

PMPs for Ubiquitous Pollutants: TOGS 1.2.1 and TOGS 1.3.3 state that the permit writer should not include a PMP requirement to address discharges of substances that are ubiquitous and not subject to effective reduction strategies for which controllable sources are a *de minimis* portion of the WLA.

NYSDEC and EPA Region 2 agree that:

- PMPs, including its monitoring requirements, will be required for all WQBELs below the level of quantification, consistent with the provisions of Procedure 8.D.6. in Appendix F of the Guidance.

- In cases where NYSDEC does not require a discharger to implement control strategies under PMP for “ubiquitous” pollutants, NYSDEC will demonstrate to EPA that the substance is ubiquitous and not subject to effective reduction strategies at that facility.

WET Program as a PMP for Aquatic Life WQBELs below the LOQ: TOGS 1.2.1 and TOGS 1.3.3 both state that, for WQBELs which are below the level of quantification and are based on the protection of aquatic life, the WET program constitutes a PMP for these WQBELs.

NYSDEC and EPA Region 2 agree that, where the WET program is designated as the PMP for a pollutant that is subject to the WQBEL below the LOQ, NYSDEC will also require the discharger to monitor for that pollutant in accordance with Procedure 8.D.1 and 8.D.2 in Appendix F of the Guidance.

XI. Compliance Schedules

TOGS 1.2.1 and TOGS 1.3.3 include provisions for addressing compliance schedules.

NYSDEC and EPA Region 2 agree that:

- For any permit issued to a new Great Lakes discharger (as defined in 40 CFR 132.2), which contains a WQBEL, NYSDEC will require the permittee to comply with such a WQBEL upon commencement of the discharge.
- NYSDEC will provide for the “2 year extension” allowed for additional studies provided for in Procedure 9.C.1. in Appendix F of the Guidance, only in instances where the WQBEL is based on a Tier II value.
- NYSDEC will limit the use of compliance schedules to new or more stringent WQBELs. When a compliance schedule goes beyond the term of the permit, NYSDEC will require that an interim permit limit, which becomes effective upon the expiration date of the permit, will be included in the permit and addressed in the permit’s fact sheet in accordance with Procedure 9.B.2 in Appendix F of the Guidance.

XII. Variances

In a previous Amendment to the NPDES MOA, dated March 16, 1998, NYSDEC and EPA Region 2 have agreed to procedures related to variances. These procedures identify a process and time frame for EPA’s review and comment on a proposed variance and NYSDEC’s response to

comments. NYSDEC and EPA further agree that EPA Region 2 shall make a determination per item III.8. of the March 16, 1998 amendment, within 30 days of NYSDEC's response to comments.

XIII. Relationship with Other Documents

The Amendment supplements the "Amendment to NPDES MOA" dated March 16, 1998.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

By: 

N.G. Kaul
Director
Division of Water

Date: 9/22/2000

U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION 2

By: 

Jeanne M. Fox
Regional Administrator

Date: SEP 27 2000

cc: Andrews /actini
Borsellino
CallahanGEORGE E. PATAKI
GOVERNORSTATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
ALBANY, NEW YORK, 12233-1010JOHN P. CAHILL
COMMISSIONER11.3/00
ph: 1

OCT 27 2000

cc: In
Muzymski
Callahan
Pawlou
BellowMs. Jeanne M. Fox
Regional Administrator
U.S. Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Dear Administrator Fox:

This is in response to your letter of September 29, 2000, regarding the "Approval of Non-Substantial National Pollution Discharge Elimination System Program Revision: Permitting Procedures for Major Electric Generating Facilities".

As requested, enclosed please find a signed copy of the amendment to the 1975 Memorandum of Agreement to remove Article I, Paragraph 4, which excludes major steam electric generating facilities seeking certificates of environmental compatibility and public need.

Sincerely,

John P. Cahill

Enclosure

cc: Maurcen O. Helmer (w/enclosure)
Chair, State of New York Department of Public Service
Board on Electric Generation Siting and the EnvironmentPeter Lehner, Esq. (w/enclosure)
Chief, Environmental Protection Bureau
New York State Department of Law

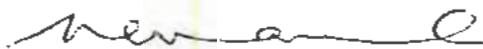
CO.

AMENDMENT TO THE
NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM
MEMORANDUM OF AGREEMENT
BETWEEN THE
NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
AND THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION II

The Memorandum of Agreement between the United States Environmental Protection Agency, Region II and the New York State Department of Environmental Conservation is hereby amended to remove Article I, Paragraph 4.

This Amendment to the Memorandum of Agreement will be effective upon the later date of signature below.

New York State
Department of Environmental Conservation

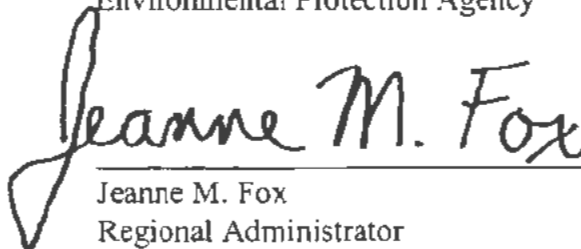


N.G. Kaul
Director, Division of Water

Dated: Albany, New York

OCT. 6, 2000

United States
Environmental Protection Agency



Jeanne M. Fox
Regional Administrator

Dated: New York, New York

SEP 29 2000



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

JUN 09 2005

Ms. Sandra Allen
Director
Division of Water, 4th Floor
New York State Department of Environmental Conservation
625 Broadway
Albany, New York 12233-3500

Dear Ms. Allen:

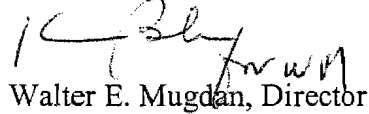
The Environmental Protection Agency (EPA), Region II terminates the waiver of review for all National Pollutant Discharge Elimination System (NPDES) permits that are determined to be significant point source discharges of nutrients to the Chesapeake Bay watershed. EPA requests that New York State Department of Environmental Conservation (NYSDEC) submit to EPA, Region II for review any draft NPDES permit for a significant point source of nutrients to the Bay watershed, in accordance with the procedures established in the Memorandum of Agreement between NYSDEC and EPA.

The focus of EPA's review will be to determine adherence to the point source nutrient wasteload allocations and other Chesapeake Bay nutrient reduction requirements contained in the New York Tributary Strategy. Based upon the recently released '*NPDES Permit Approach for Discharges of Nutrients in the Chesapeake Bay Watershed, December 2004*', EPA and the states have agreed that permits will be reissued with nutrient limits consistent with the applicable tributary strategy after the Maryland Water Quality Standards for the Chesapeake Bay are approved by EPA.

EPA regulations at 40 CFR 122.44(d)(1) require that permits include effluent limitations for any pollutant in a discharge which the permitting authority determines that causes, has the reasonable potential to cause, or contributes to an excursion above applicable water quality criteria. To ensure compliance with these regulations and with the Chesapeake Bay permitting approach, NYSDEC must submit to EPA for review all draft NPDES permit actions (issuance, reissuance, and modifications for major, minor, and general permits) for facilities determined to be significant point source dischargers of total nitrogen or total phosphorus to the Chesapeake Bay watershed. Whether a facility is a significant point source discharger of total nitrogen or phosphorous into the Bay is determined by the state's tributary strategy. Enclosed is a list of all the dischargers, both minor and major, currently identified as significant sources. In addition, if NYSDEC determines that facilities other than those listed in the enclosure are significant dischargers of nutrients to the Chesapeake Bay watershed, NYSDEC must also submit the draft NPDES permit actions (issuance, reissuance, and modifications for major, minor, and general permits) for those facilities to EPA for review.

Termination of EPA's wavier of review of NPDES permits is expressly provided for in 40 CFR 123.24(e)(1) and Article III, Part 5 of the Memorandum of Agreement (MOA). I appreciate your cooperation in this regard. If you have any questions, please contact me at (212) 637-3724 or have your staff call Maureen Krudner of my staff at (212) 637-3874.

Sincerely,



Walter E. Muggan, Director

Division of Environmental Planning and Protection

Enclosure

cc: Steve Eidt, Water Manager, NYSDEC - Region 7 (w/enclosure)
Richard E. Draper, P.E., Bureau Director, Bureau of Water Permits, NYSDEC
(w/enclosure)

NY Significant Point Sources in the Chesapeake Bay Watershed

Disclaimer: This is preliminary data for internal use by EPA and its Chesapeake Bay Program partner

Updated:

6/3/05

PERMIT NO.	STATE	FACILITY	CBP BASIN	DESIGN FLOW	PERMIT TYPE	PERMIT EXPIRES
NY0004189	NY	KRAFT FOODS, INC	SUSQUEHANNA RIVER	0.67	MINOR	9/1/2005
NY0004308	NY	POLLIO DAIRY	SUSQUEHANNA RIVER	0.9	MINOR	7/1/2008
NY0020320	NY	ADDISON (V)	SUSQUEHANNA RIVER	0.42	MINOR	7/1/2006
NY0020672	NY	HAMILTON (V)	SUSQUEHANNA RIVER	0.85	MAJOR	12/18/2000
NY0021407	NY	GREENE (V)	SUSQUEHANNA RIVER	0.45	MINOR	2/1/2007
NY0021423	NY	NORWICH	SUSQUEHANNA RIVER	2.375	MAJOR	8/31/2010
NY0021431	NY	BATH (V)	SUSQUEHANNA RIVER	1	MAJOR	7/1/2007
NY0021466	NY	SHERBURNE (V)	SUSQUEHANNA RIVER	0.427	MINOR	7/31/2010
NY0022357	NY	ALFRED (V)	SUSQUEHANNA RIVER	0.98	MAJOR	11/1/2008
NY0022730	NY	OWEGO (T) #1	SUSQUEHANNA RIVER	0.848	MAJOR	4/1/2009
NY0023248	NY	CANISTEO (V)	SUSQUEHANNA RIVER	0.7	MINOR	10/31/2010
NY0023591	NY	COOPERSTOWN	SUSQUEHANNA RIVER	0.75	MAJOR	2/1/2009
NY0023647	NY	HORNELL (C)	SUSQUEHANNA RIVER	4	MAJOR	6/1/2007
NY0023906	NY	ERWIN (T)	SUSQUEHANNA RIVER	1.75	MAJOR	3/1/2006
NY0024414	NY	BINGHAMTON-JOHNSON CITY JOINT BOROUGH	SUSQUEHANNA RIVER	20	MAJOR	6/1/2007
NY0025712	NY	PAINTED POST (V)	SUSQUEHANNA RIVER	0.5	MAJOR	1/1/2008
NY0025721	NY	CORNING (C)	SUSQUEHANNA RIVER	3.08	MAJOR	8/1/2009
NY0025798	NY	OWEGO #2	SUSQUEHANNA RIVER	2	MAJOR	6/1/2006
NY0027561	NY	CORTLAND (C)	SUSQUEHANNA RIVER	9	MAJOR	5/1/2009
NY0027669	NY	ENDICOTT (V)	SUSQUEHANNA RIVER	10	MAJOR	11/30/2008
NY0029262	NY	OWEGO (V)	SUSQUEHANNA RIVER	1	MAJOR	4/1/2008
NY0029271	NY	SIDNEY (V)	SUSQUEHANNA RIVER	1.7	MAJOR	1/1/2006
NY0031089	NY	WAVERLY (V)	SUSQUEHANNA RIVER	0.85	MINOR	7/1/2006
NY0031151	NY	ONEONTA (C)	SUSQUEHANNA RIVER	4	MAJOR	7/1/2007
NY0031411	NY	RICHFIELD SPRINGS (V)	SUSQUEHANNA RIVER	0.6	MINOR	9/1/2007
NY0035742	NY	ELMIRA / CHEMUNG CO. SD #2	SUSQUEHANNA RIVER	12	MAJOR	3/1/2009
NY0036986	NY	LAKE STREET/CHEMUNG COUNTY SD #1	SUSQUEHANNA RIVER	9.5	MAJOR	3/1/2009
NY0213781	NY	CHENANGO NORTHGATE	SUSQUEHANNA RIVER	0.8	MINOR	7/1/2008